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IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

Hospital Service District No. 1 of Tangipahoa Parish, *et al*,
Petitioners,

v.

Surgical Care Center of Hammond,
Respondent.

Richland Parish Hospital Service District 1-B, *et al*,
Petitioners,

v.

Ralph Abraham, M.D., *et al*,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

REPLY OF THE PETITIONERS

(additional counsel on inside cover)

Thomas C. Goldstein
(Counsel of Record)
Boies & Schiller LLP
5301 Wisconsin Ave., NW
Washington, D.C. 20015
(202) 237-2727

October 14, 1999

Petitioners' Counsel (cont'd)

Surgical Care Center of Hammond v. *Hospital Service Dist. No. 1*:

Robert S. Rooth
Chaffe, McCall, Phillips
Toler & Sarpy, LLP
2300 Energy Centre
1100 Poydras St.
New Orleans, LA 70163

Daniel M. Mulholland, III
Susan Lapenta
Horty, Springer & Mattern, P.C.
4614 Fifth Ave.
Pittsburgh, PA 15213

Abraham v. *Richland Parish Hosp. Serv. Dist. No. 1*:

Gordon L. James
Hudson, Potts & Bernstein, LLP
130 Desiard Street
P.O. Drawer 3008
Monroe, LA 71201

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REPLY OF THE PETITIONERS

Respondents' Brief in Opposition ("BIO") in no way undercuts the reasons for granting certiorari in these consolidated cases. In particular, Respondents fail to rebut the clear circuit conflict demonstrated by the Petition. The Fifth Circuit refused to accord antitrust immunity in these cases on the ground that the Louisiana Hospital Service District law ("HSD law") does not "subject [Respondents] to the authority" of Petitioners through regulation and does not "necessarily contemplate[]" the challenged anticompetitive conduct. Pet. App. 7. By contrast, the Eleventh Circuit consistently holds that antitrust immunity arises from indistinguishable public hospital statutes and expressly "*reject[s]* the suggestion that, in order to render anticompetitive conduct foreseeable, a state must enact either specific legislation from which anticompetitive conduct must ordinarily or routinely occur or specific legislation creating regulatory or monopolistic powers." *FTC* v. *Hospital Bd. of Dirs. of Lee County*, 38 F.3d 1184 (1994) ("*Lee County*") (emphasis added). The Fourth Circuit similarly holds that indistinguishable public hospital statutes create immunity and avowedly "deal[s] leniently with the question of legislative contemplation of an anticompetitive effect." *Omni Outdoor Advertising* v. *City of Columbia*, 891 F.2d 1127, 1132 (1989), *aff'd*, 499 U.S. 365 (1991); *Coastal Neuro-Psychiatric Assocs.* v. *Onslow Mem. Hosp.*, 795 F.2d 340 (1986) ("*Coastal Neuro*").

Respondents never confront these points, but instead resort to misdirection. Working from the premise that the HSD law announces a purpose to increase competition between public and private hospitals, Respondents repeatedly assert that anticompetitive conduct is not the "foreseeable result" of the statute. Not only does that argument have nothing to do with the circuits' conflicting legal standards, but Respondents' premise is itself false. Specifically, Respondents rely on two words – "equally" and "effectively" – in an unrelated

provision of the HSD law that *expressly* do not apply here. Moreover, as state authorities uniformly have concluded, Pet. 21, even those two words announce only Louisiana's intent to compensate for various competitive disadvantages that burden all public hospitals, not an intent to "increase competition" generally in the market for hospital services. At bottom, Respondents' confusing and erroneous construction of the HSD law is nothing more than an attempt to portray these cases as fact-bound when in reality the Petition squarely presents a plain, important, and recurring conflict in the circuits.

Certiorari also is warranted because the scope of antitrust immunity bears directly on the relationship between the federal government and sovereign states. Specifically, because this question determines how state governments structure their relationships with their political subdivisions, the Fifth Circuit's restrictive standard and the confusion in the circuits generally may compel states to rewrite a variety of laws in order to provide continued insulation from federal antitrust liability. *Accord* Br. *Amicus Curiae* of Washington Legal Foundation 8-13. Although Respondents suggest that this Court's decisions in *City of Columbia* v. *Omni Outdoor Advertising*, 499 U.S. 365 (1991) ("*City of Columbia*"), and *Town of Hallie* v. *City of Eau Claire*, 471 U.S. 34 (1985) ("*Town of Hallie*"), sufficiently address the standard for finding antitrust immunity, the conflicting rules adopted by the courts of appeals establish that more guidance is needed than the unelaborated "foreseeability" standard announced in those cases. Just as important, Respondents do not dispute that this Court has yet to articulate how immunity applies when, as in these and many other cases, local governments compete directly against private businesses. Nor do Respondents dispute that the question presented recurs frequently, a point well illustrated by a newly filed petition for certiorari in an antitrust immunity case from the Ninth Circuit. *Redwood Empire Life Support* v. *County of Sonoma*, No. 98-15170,

1999 WL 700577 (9th Cir. Sept. 10, 1999) (petition for cert. filed Oct. 12, 1999).

Finally, contrary to Respondents' suggestion, BIO 23, this Petition is properly considered at this time. Further proceedings in the district court will not shed light on the question to be presented to this Court, and Respondents do not contend otherwise, because under this Court's precedents Petitioners' immunity is to be judged at the outset of the case based on the allegations of the complaint. Respondents therefore cannot identify any reason why the proceedings on remand would assist this Court's resolution of the antitrust immunity issue. Moreover, the entire point of local antitrust immunity is to ensure that political subdivisions are "immunized *from suit*," *City of Lafayette* v. *Louisiana Power & Light*, 435 U.S. 389, 413 n.41 (1978) (plurality opinion) (emphasis added), not merely from liability. The immunity doctrine thus is intended to prevent Petitioners from undergoing the cost and burden of two sets of proceedings in both the district court and court of appeals only to later establish in this Court that these cases should have been dismissed at the outset. Presumably for these reasons, this Court granted certiorari in one of its leading municipal antitrust immunity cases – *City of Lafayette* – in precisely this procedural posture.

I. Respondents Seriously Misconstrue The One Provision Of The HSD Law On Which They Rely.

The one statute on which Respondents rely to establish Louisiana's supposed pro-competitive intent, La. Rev. Stat. 46:1071, simply is not relevant. In particular, Respondents fail to advise the Court of critical language that expressly limits the application of § 1071. Contrary to the brief quotation set forth in the BIO, § 1071 *actually* provides: "The legislature hereby declares that *the purpose of R.S. 46:1071 through 1076* is to enhance the ability of a hospital service district to compete effectively and equally in the market for health care services. Towards this end, *the provisions of R.S. 46:1071 through 1076* shall be construed liberally." La. Rev.

Stat. 46:1071, *reprinted at* Pet. App. 95 (emphasis added).[1] As Petitioners explain below, the statutes referenced in this provision (§§ 1071-76) have nothing to do with the conflict between the decisions below and rulings of the Fourth and Eleventh Circuits.

In addition, Respondents misconstrue even the two words – "equally" and "effectively" – on which they rely. As the Petition explained, at 19-20, this provision in context simply announces the legislature's intent to *compensate* for pre-existing competitive disadvantages that burden public hospitals, which the state did not withdraw.[2] Respondents also are

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[1] Respondents thus are wrong to state that "[b]ecause Section 1077 was enacted one year after Sections 1071-76, petitioners suggest that Section 1077 should be interpreted without regard to Section 1071." BIO 15 n.9. Instead, the purpose language on which Respondents' rely could not be more explicit in applying only to §§ 1071-76.

[2] Thus, only Petitioners' reading of § 1071 is consistent with the realities of "the health care market * * * in which public hospitals operate." Br. *Amicus Curiae* of National Association of Public Hospitals & Health Systems 8; Pet. 20. Respondents advance a contrary history of the HSD law, but do so only by adding language to § 1071 that simply does not exist and by putting forward a construction that not even the Fifth Circuit endorsed. Section 1071 sets out the legislature's finding that "hospital[s] and other health care providers are contracting to engage in economic joint ventures or form partnerships to offer integrated health care services to the public" and that "this increasing competition is forcing hospitals and other health care providers to develop market[ing] strategies and strategic plans to effectively compete." La. Rev. Stat. 46:1071, *reprinted at* Pet. App. 95. But Respondents reword the statute as if it states that only "private providers," BIO 4 (quotations adding bracketed material), are entering into "joint ventures" and developing "market[ing] strategies," in order to argue that the legislature intended only to provide an "equal" power to public hospital districts.

That Respondents' argument turns entirely on words that are not in the statute speaks for itself. The statute properly is read to mean what it says, which is that the legislature recognized that the entire hospital market was becoming more competitive and that all hospitals – both

wrong to maintain that the provisions cited by the competition proviso (§§ 1071-76) do nothing more than "exempt[] public hospitals from certain laws applicable to public agencies, including various sunshine laws," BIO 4, given that every single provision cited by Respondents also provides an exemption from "*any law to the contrary*."[3] This is the view uniformly adopted by statute authorities, Pet. 21, and the contrary view of the decisions below can only "embroil the federal courts in the unnecessary interpretation of state statutes," *City of Columbia*, 499 U.S. at n.4.[4]

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public and private – were engaging in joint ventures. As the Petition explained and Respondents do not contest, public hospital districts possessed all corporate powers including the power to enter into joint ventures *prior* to the adoption of § 1071; nor has there ever has been a prohibition on "marketing strategies." Pet. 19; La. Rev. Stat. 46:1052(5) (power "[t]o cooperate with other public and private institutions and agencies engaged in providing hospital and other health services"), *id.* 46:1060 (hospital districts "shall constitute a body corporate in law with all the powers of a corporation").

[3] *See* La. Rev. Stat. 46:1073(A) (power to develop "marketing strategies" "notwithstanding any law to the contrary"); *id.* 46:1073(B) ("Notwithstanding the provisions of R.S. 42:4.1 et seq. [public meeting requirement] or any other law to the contrary"); *id.* 46:1073(C) ("Notwithstanding the provisions of R.S. 44:1 et seq. [public records law] or any other law to the contrary"); *id.* 46:1074 ("notwithstanding the provisions of R.S. 41:1211 et seq. [public leasing law] or any other law to the contrary); *id.* 46:1075 ("notwithstanding the provisions of R.S. 43:111 et seq. [public advertising law] or any other law to the contrary")), *reprinted in* Pet. App. 97-100.

[4] Respondents quote Op. La. Atty. Gen. 95-346 (Aug. 18, 1995), which only paraphrases the legislature's intent "to permit the hospital service district equal ability to compete." BIO 5. In more recent opinions that actually give meaning to the words "equal" and "compete," the State Attorney General expressly has concluded that the statute grants "broad and sweeping authority" and "broad authority to execute contracts of every kind in order to carry out the objects and purposes of a [hospital] district." Op. La. Att'y Gen. 96-510 (Jan. 14, 1997); Op. La. Att'y Gen. 96-350 (Oct. 29, 1996).

II. The Circuits Are Substantially Divided Over The Appropriate Test For Finding Local Antitrust Immunity And Specifically Are Divided Over Whether Immunity Arises From Public Hospital Statutes Indistinguishable From The HSD Law.

The en banc Fifth Circuit in these cases did not merely invoke this Court's "foreseeability" standard, *contra* BIO 10, but instead, like the Fourth and Eleventh Circuits before it, articulated its own test for finding local antitrust immunity.[5] Specifically, the court of appeals grounded its holding on the "distinction between a statute that in empowering a municipality necessarily contemplates the anticompetitive activity from one that merely allows a municipality to do what other businesses can do." Pet. App. 7. The court specified in "[a]pplying this distinction" both that immunity applies only when the state "subjects [private] businesses to the authority" of local government and furthermore that the joint venture provision of the HSD law does not provide immunity because "[n]ot *all* joint ventures are anticompetitive." *Id.* (emphasis added).[6] The Fourth and Eleventh Circuits have rejected such conditions on immunity and have reached the opposite result on essentially identical facts.

A. The Eleventh Circuit

The Eleventh Circuit repeatedly has found antitrust immunity in indistinguishable cases. The Fifth Circuit itself all but acknowledged the conflict, as do Respondents. Pet. App. 9

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[5] Petitioners do not maintain that the Fifth Circuit requires that states invoke "a magical phrase" in order to confer immunity. *Contra* BIO 14 (misquoting an unrelated discussion at Pet. for Cert. 16). Instead, the Fifth Circuit plainly finds immunity only when state law meets the substantive criteria on which the decisions below rest.

[6] Respondents themselves seem to acknowledge that this aspect of the decision below is erroneous, given that not *all* zoning – the municipal power at issue in *City of Columbia* – is anticompetitive either. BIO 13 n.7.

("The Eleventh Circuit's decision lies closer to the margin."); BIO 18 (*Lee County* "is close[] but still distinguishable"). *Accord* Pet. for Cert. 22 (explaining that the Eleventh Circuit rejected the standard adopted below when it was raised by the U.S. Federal Trade Commission, and that the F.T.C. now maintains that Eleventh Circuit precedent is "wrongly decided").

This conflict is manifest because it extends to three legal issues, Pet. 23-24, none of which Respondents address. First, the Fifth Circuit requires that state law "necessarily contemplate[]" anticompetitive activity, Pet. App. 7, while the Eleventh Circuit consistently "has required only that the anticompetitive conduct be reasonably anticipated, rather than the inevitable, ordinary, or routine outcome of a statute," *Lee County*, 38 F.3d at 1191.[7] Second, the Fifth Circuit withholds immunity where state law "merely allows a municipality to do what other businesses can do," Pet. App. 7, while the Eleventh Circuit awards immunity to public hospitals that are "given powers to act exactly as private hospitals would act," *id.* at 1184 n.5. Third, the Fifth Circuit goes still further in requiring that the state "subject [private] businesses to the authority of" the local government, Pet. App. 7, while the Eleventh Circuit awards immunity notwithstanding that the municipality has no "regulatory powers," 38 F.3d at 1184 n.5. Respondents dispute none of these legal conflicts, but to the contrary *repeatedly reinforce* the Petition's showing that the Fifth Circuit refused to find immunity in these cases because "[t]he Louisiana hospital service district law does not purport to confer upon municipalities *any* regulatory authority over

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[7] Respondents, in putting forward the most restrictive statement of the Eleventh Circuit's standard that they can find, say only that in that court "'there must be *some showing* that the anticompetitive results were more than *merely plausible*.'" BIO 20 (quoting *Lee County*, 38 F.3d at 1191 n.6) (emphasis added). This formulation only highlights the conflict with the Fifth Circuit's restrictive view of antitrust immunity.

the pertinent market," BIO 13 (emphasis in original), which unquestionably conflicts directly with Eleventh Circuit precedent. *See also* BIO 3, 8-9 (quoting Pet. App. 7), 9 ("Louisiana law places no such over-arching regulatory controls over the hospital services market.").

Respondents' argument that the Eleventh Circuit's decision in *Lee County* can be limited to its facts – *i.e.*, to cases involving a municipality with monopoly power – was addressed fully by the Petition, which explained that *five* other decisions of the Eleventh Circuit (as well as four district court rulings within that circuit) have applied the conflicting standard of *Lee County*, *none* of which involved a pre-existing monopoly. Pet. 25-26 & n.9. Respondents' alternative argument that La. Rev. Stat. 46:1071, but not the Florida statutes at issue in *Lee County*, purportedly contains "an express intent on the part of the state to promote competition," BIO 19, was addressed fully above because § 1071 is *irrelevant* for present purposes. As the Petition explained, and Respondents do not contest, the two provisions of Florida law at issue in *Lee County* are paralleled exactly by provisions of the Louisiana HSD law, which are not affected by § 1071.[8]

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[8] The Florida statutes in *Lee County* set forth a purpose for hospital districts to "establish and provide for the operation and maintenance of * * * facilities devoted to the provision of healthcare services," while Louisiana law sets forth a purpose "[t]o own and operate hospitals for the care of persons suffering from illnesses or disabilities which require that patients receive hospital care." 1963 Fla. Spec. Laws ch. 63-1552, § 1, *as amended by* ch. 87-438, § 1; La. Rev. Stat. 46:1024. The Florida statutes also grant authority to "be a partner in, or participate in or control, any venture, corporation, partnership, or other organization, public or private * * * in furtherance of, the purposes and best interests of the hospital." Fla. Spec. Laws. ch. 63-1552, § 23, *as amended by* ch. 87-438, § 7. Louisiana not only grants hospital districts a parallel authority to "contract with or engage in a joint venture with any person, corporation, partnership, or group of persons to offer, provide, promote, establish, or sell any hospital health services," but it also specifies that this authority is to be exercised "notwithstanding *any*

At the end of a footnote, Respondents also assert that *Lee County* can be distinguished because "the challenged anti-competitive conduct in *Lee County* involved the acquisition of another hospital." BIO 19 n.12. But any such distinction undermines Respondents' position. By any measure, the monopolist's acquisition of a competitor in *Lee County* would undermine competition *more* than the exclusive third-party contract before the Fifth Circuit. Yet *Lee County* awarded antitrust immunity while the Fifth Circuit denied it in these cases.

B. The Fourth Circuit

The Petition explained that the Fourth Circuit awards antitrust immunity when reduced competition "'may'" result from state law, Pet. 27 (quoting *Coastal Neuro*, 795 F.2d at 342), and that the Fourth Circuit's view is embedded in numerous precedents, one of which *this Court* affirmed. Respondents address all this authority only by stating that the Fourth Circuit's opinion in one case – *Coastal Neuro* – describes one of the North Carolina statutes in that case – under which public hospitals may withhold physician privileges – as conferring "'regulatory benefits.'" BIO 21 (quoting 795 F.2d at 342). That, of course, has nothing to do with the Fourth Circuit's well-established legal standard, and Respondents cannot and do not suggest that the Fourth Circuit limits antitrust immunity to statutes conferring regulatory authority. Moreover, even if this statement in *Coastal Neuro* were relevant, the obvious response is that Louisiana has an indistinguishable physician-privilege statute that is not subject to § 1071, but the Fifth Circuit nonetheless refused to find antitrust immunity. *See* Pet. 26-28 & nn. 10, 12.[9] That the Fourth

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other law to the contrary." La. Rev. Stat. 46:1077, *reprinted at* Pet. App. 100-01 (emphasis added).

[9] The North Carolina statute in question sets out neutral criteria for awarding physician privileges such as "education, training, experience, demonstrated competence and ability, and judgment and character," and then provides that "[n]othing in this Part shall be deemed to

Circuit found that the North Carolina law conferred "regulatory benefits" while the Fifth Circuit did not take the same view of the parallel Louisiana law only *highlights* the conflict between the views of those courts.

CONCLUSION

For the foregoing reasons and those stated in the Petition, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

(additional counsel inside cover)

Thomas C. Goldstein
(Counsel of Record)
Boies & Schiller LLP
5301 Wisconsin Ave., NW
Suite 570
Washington, D.C. 20015
(202) 237-2727

Dated: October 14, 1999

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mandate hospitals to grant or deny to any such individuals or other privileges to practices in hospitals." N.C. Gen. Stat. § 131E-85(a). Louisiana's parallel statute provides that "[n]othing in this Section shall be construed to require the governing body of any nonprofit hospital to grant staff membership to any applicant, provided that each such applicant is considered on an individual basis regarding his qualification." La. Rev. Stat. 37:1301.

The other North Carolina statute invoked by the Fourth Circuit in *Coastal Neuro* authorizes "municipalities to construct, operate and maintain hospital and other facilities which furnish hospital, clinical and similar services" and "to cooperate with other public and private agencies and with each other." N.C. Gen. Stat. § 131E-5 (b), (d). The Louisiana HSD law is, again, indistinguishable. It authorizes municipalities to "own and operate hospitals for the care of persons suffering from illnesses or disabilities which require that patients receive hospital care" and "[t]o cooperate with other public and private institutions and agencies engaged in providing hospital and other health services to residents of the district." La. Rev. Stat. 46:1052(1), (5), *reprinted at* Pet. App. 70.